

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TRACIE BRYAN, O/B/O T.R.J., a  
minor child,

Plaintiff,

v.

CAROLYN W. COLVIN,

Defendant.

NO: 14-CV-5043-FVS

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 14 and 17. This matter was submitted for consideration without oral argument. Plaintiff was represented by D. James Tree. Defendant was represented by Franco L. Becia. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment.

**JURISDICTION**

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT ~ 1

1 Tracie Bryan protectively filed for supplemental security income (“SSI”) on  
2 behalf of T.R.J., a minor (“Plaintiff”), on November 9, 2010. Tr. 165. Plaintiff  
3 alleged an onset date of November 9, 2010. Tr. 165. Benefits were denied initially  
4 (Tr. 108-110) and upon reconsideration (Tr. 114-116). Plaintiff requested a hearing  
5 before an administrative law judge (“ALJ”), which was held before ALJ R.J. Payne  
6 on February 7, 2013, with a supplemental hearing on April 25, 2013. Tr. 40-85.  
7 Plaintiff was represented by counsel. Plaintiff’s mother, Tracie Bryan, and medical  
8 expert Margaret Moore, Ph.D., also testified. Tr. 44-65, 71-84. The ALJ denied  
9 benefits (Tr. 15-39) and the Appeals Council denied review. Tr. 1. The matter is  
10 now before this court pursuant to 42 U.S.C. § 405(g).

## 11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing and  
13 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner,  
14 and will therefore only be summarized here.

15 Plaintiff was 12 years old at the time of the hearings. Tr. 42, 72. Plaintiff’s  
16 mother testified that Plaintiff is aggressive and violent with her and Plaintiff’s  
17 sister a couple of times a week. Tr. 73. She testified that Plaintiff has been  
18 suspended from school seven or eight times, and that she gets “complaints” from  
19 school several times a month. Tr. 74-75, 78. Plaintiff’s mother testified that  
20 Plaintiff is on medication for sleeping but it does not help. Tr. 79. She testified that

1 Plaintiff has no friends, does no chores, and is only interested in a hand-held video  
2 game device. Tr. 80-83. Plaintiff alleges disability based on attention deficit  
3 hyperactivity disorder (“ADHD”), learning disability, and asthma. *See* Tr. 114.

#### 4 STANDARD OF REVIEW

5 A district court's review of a final decision of the Commissioner of Social  
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
7 limited: the Commissioner's decision will be disturbed “only if it is not supported  
8 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,  
9 1158–59 (9th Cir.2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means  
10 relevant evidence that “a reasonable mind might accept as adequate to support a  
11 conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently,  
12 substantial evidence equates to “more than a mere scintilla[,] but less than a  
13 preponderance.” *Id.* (quotation and citation omitted). In determining whether this  
14 standard has been satisfied, a reviewing court must consider the entire record as a  
15 whole rather than searching for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its  
17 judgment for that of the Commissioner. If the evidence in the record “is susceptible  
18 to more than one rational interpretation, [the court] must uphold the ALJ's findings  
19 if they are supported by inferences reasonably drawn from the record.” *Molina v.*  
20 *Astrue*, 674 F.3d 1104, 1111 (9th Cir.2012). Further, a district court “may not

1 reverse an ALJ's decision on account of an error that is harmless.” *Id.* at 1111. An  
2 error is harmless “where it is inconsequential to the [ALJ's] ultimate nondisability  
3 determination.” *Id.* at 1115 (quotation and citation omitted). The party appealing  
4 the ALJ's decision generally bears the burden of establishing that it was harmed.  
5 *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

### 6 SEQUENTIAL EVALUATION PROCESS

7 On August 22, 1996, Congress passed the Personal Responsibility and Work  
8 Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 105 which  
9 amended 42 U.S.C. § 1382c(a)(3). Under this law, a child under the age of  
10 eighteen is considered disabled for the purposes of SSI benefits if that individual  
11 has a medically determinable physical or mental impairment, which results in  
12 marked and severe functional limitations, and which can be expected to result in  
13 death or which has lasted or can be expected to last for a continuous period of not  
14 less than 12 months. 42 U.S.C. § 1382(c)(a)(3)(C)(i)(2003).

15 The regulations provide a three-step process to determine whether a child is  
16 disabled. First, the ALJ must determine whether the child is engaged in substantial  
17 gainful activity. 20 C.F.R. § 416.924(b). If the child is not engaged in substantial  
18 gainful activity, the analysis proceeds to step two. Step two requires the ALJ to  
19 determine whether the child’s impairment or combination of impairments is severe.  
20 20 C.F.R. § 416.924(c). The child will not be found to have a severe impairment if

1 it constitutes a slight abnormality or combination of slight abnormalities that cause  
2 no more than minimal functional limitations. *Id.* If, however, there is a finding of  
3 severe impairment, the analysis proceeds to the final step, which requires the ALJ  
4 to determine whether the impairment or combination of impairments meet,  
5 medically equal or functionally equal the severity of a set of criteria for an  
6 impairment in the listings. 20 C.F.R. § 416.924(d).

7 The regulations provide that an impairment will be found functionally  
8 equivalent to a listed impairment if it results in extreme limitations in one area of  
9 functioning or marked limitations in two areas of functioning. 20 C.F.R. §  
10 416.926a(a). To determine functional equivalence, the following six broad areas  
11 of functioning, or domains, are considered: acquiring and using information,  
12 attending and completing tasks, interacting and relating with others, moving about  
13 and manipulating objects, caring for self, and health and physical well-being. 20  
14 C.F.R. § 416.926a.

#### 15 ALJ'S FINDINGS

16 At step one of the sequential evaluation process, the ALJ found Plaintiff had  
17 not engaged in substantial gainful activity since November 9, 2010, the alleged  
18 onset date. Tr. 21. At step two, the ALJ found Plaintiff has the following severe  
19 impairments: asthma; attention deficit hyperactivity disorder ("ADHD"); mood  
20 disorder not otherwise specified; history of oppositional defiant disorder; question

1 learning disorder; and question parent-child issues. Tr. 21. At step three, the ALJ  
2 found that Plaintiff does not have an impairment or combination of impairments  
3 that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404,  
4 Subpt. P, App'x 1. Tr. 26. The ALJ then determined Plaintiff does not have an  
5 impairment or combination of impairments that functionally equals the severity of  
6 the listings. Tr. 26. As a result, the ALJ concluded that Plaintiff has not been  
7 disabled, as defined in the Social Security Act, since November 9, 2009, the date  
8 the application was filed. Tr. 36.

## 9 ISSUES

10 The question is whether the ALJ's decision is supported by substantial  
11 evidence and free of legal error. Specifically, Plaintiff asserts that (1) the ALJ  
12 improperly rejected the opinions of Plaintiff's treating, examining, and reviewing  
13 physicians; and (2) the ALJ erred at step 3 of the sequential evaluation. ECF No.  
14 14 at 6-25. Defendant argues that (1) the ALJ properly considered and addressed  
15 the medical opinion evidence of record; and (2) substantial evidence supports the  
16 ALJ's finding that Plaintiff's impairments do not meet or functionally equal a  
17 listing. ECF No. 17 at 4-18.

## 18 DISCUSSION

### 19 A. Medical Opinions

1       There are three types of physicians: “(1) those who treat the claimant  
2 (treating physicians); (2) those who examine but do not treat the claimant  
3 (examining physicians); and (3) those who neither examine nor treat the claimant  
4 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”  
5 *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir.2001)(citations omitted).  
6 Generally, a treating physician's opinion carries more weight than an examining  
7 physician's, and an examining physician's opinion carries more weight than a  
8 reviewing physician's. *Id.* If a treating or examining physician's opinion is  
9 uncontradicted, the ALJ may reject it only by offering “clear and convincing  
10 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d  
11 1211, 1216 (9th Cir.2005). Conversely, “[i]f a treating or examining doctor's  
12 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by  
13 providing specific and legitimate reasons that are supported by substantial  
14 evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830–831 (9th Cir.1995)).  
15 Plaintiff argues the ALJ improperly rejected the opinions of Plaintiff’s treating,  
16 examining, and reviewing physicians. ECF No. 14 at 7-17.

### 17       **1. Dr. Cheta Nand**

18       On January 30, 2012, Dr. Nand, Plaintiff’s treating physician, completed two  
19 “affidavit of physician” forms indicating that Plaintiff met listing 112.11 for  
20 ADHD and listing 112.04 for mood disorders Tr. 369-373. The finding as to the

1 ADHD listing was “based upon the following evidence:” hyperactivity; doing  
2 poorly in school; and major difficulty in focusing. Tr. 369. The opinion regarding  
3 “mood disorder” listing was based on evidence of labile mood, and “get[ting]  
4 angry or aggressive at times [and] other times feels sad and depressed.” Tr. 371.  
5 The ALJ granted Dr. Nand’s opinion “no weight” because “[a]s outlined by Dr.  
6 Moore, the opinion by Dr. Nand is totally unsupported by her own treatment  
7 notes.” Tr. 28-29. Plaintiff argues the ALJ improperly rejected the opinion of Dr.  
8 Nand without providing adequate reasoning. ECF No. 14 at 8-13.

9 As an initial matter, Plaintiff argues that the ALJ improperly relies on the  
10 opinion of non-examining medical expert, Dr. Margaret Moore, to reject Dr.  
11 Nand’s opinion. ECF No. 20 at 1-2. Plaintiff correctly notes that “[t]he opinion of a  
12 nonexamining physician cannot *by itself* constitute substantial evidence that  
13 justifies the rejection of the opinion of either an examining or a treating physician.”  
14 *Lester v. Chater*, 81 F.3d 821, 831 (9th Cir. 1995)(emphasis added). However, the  
15 court notes that social security regulations dictate that “with respect to the  
16 disability of an individual who has not attained the age of 18 years ..., the  
17 Commissioner of Social Security *shall* make reasonable efforts to ensure that a  
18 qualified pediatrician” or specialist in the appropriate field evaluates the case as a  
19 whole. 42 U.S.C. § 1382c(a)(3)(I)(emphasis added). Moreover, when the treating  
20 physician's opinion is contradicted by medical evidence, the opinion may still be



1 rejected if the ALJ provides specific and legitimate reasons supported by  
2 substantial evidence in the record. *See Andrews v. Shalala*, 53 F.3d 1035, 1041  
3 (9th Cir.1995). Here, the ALJ noted contradictions in the medical evidence, and  
4 offered additional reasoning for rejecting Dr. Nand's opinion. Specifically, the ALJ  
5 found that Dr. Nand's opinion was "totally unsupported" by her treatment notes.  
6 Tr. 28-29. Consistency with the medical record as a whole, and between a treating  
7 physician's opinion and his or her own treatment notes, are relevant factors when  
8 evaluating a treating physician's medical opinion. *See Bayliss*, 427 F.3d at 1216.  
9 Plaintiff argues at length that the ALJ in this case improperly failed to consider the  
10 episodic nature of bipolar disorder and "made no attempt to explain why some  
11 periods of improvement and other periods of severely impaired functioning would  
12 be inconsistent with Dr. Nand's diagnosis of bipolar disorder and observations of  
13 labile mood." ECF No. 14 at 10-13 (citing *Scott v. Astrue*, 647 F.3d 734, 740 (7th  
14 Cir. 2006) (noting the ALJ is not permitted to "cherry pick" from record  
15 particularly when "[t]he very nature of bipolar disorder is that people with the  
16 disease experience fluctuations in their symptoms, so any single notation that a  
17 patient is feeling better or has had a 'good day' does not imply that the condition  
18 has been treated.")).

19       However, in contrast to Plaintiff's argument that the ALJ improperly cherry-  
20 picked from the evidence to support his conclusion, a review of the ALJ's entire

1 decision reveals that the ALJ properly set out a “detailed and through summary of  
2 the facts and conflicting medical evidence, stating his interpretation thereof, and  
3 making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998); Tr. 21-26,  
4 27-29. Moreover, while Plaintiff cites notes taken by Dr. Nand that would tend to  
5 support Plaintiff’s claimed limitations, those same notes continuously reference  
6 ongoing improvement and largely normal findings on mental status exams; which  
7 is inconsistent with Plaintiff’s argument that the ALJ’s findings ignored the alleged  
8 “episodic nature” of Plaintiff’s claimed bipolar disorder. In his decision, the ALJ  
9 referenced observations in all of Dr. Nand’s notes that “indicate the claimant had  
10 intact judgment and insight, good coping skills, and intact cognitive skills. Tr. 29.  
11 In September 2008 Dr. Nand noted that Plaintiff had “major difficulties sitting still  
12 in the assessment, asking many times if it was time to go,” and “was up and down  
13 on the chair, on the ground, pacing, asking to go use the bathroom.” Tr. 310-311.  
14 However, during this *same* assessment, Dr. Nand found that Plaintiff was “alert  
15 and oriented,” with articulate speech, intact memory, and “fully focused.” Tr. 311.  
16 In August 2009, Plaintiff notes that Dr. Reuben Singer, M.D., another physician at  
17 Dr. Nand’s office, noted the diagnoses of ADD w/hyperactivity, learning  
18 problems, ODD, and bipolar disorder. Tr. 319. However, Plaintiff’s briefing did  
19 not include Dr. Singer’s findings that Plaintiff was “clinically stable” and  
20 Plaintiff’s own reports that he was “doing well” on his medications” and “happy

1 about his new classes and teacher.” Tr. 319-320. Again, Plaintiff highlights Dr.  
2 Nand’s finding in March 2010 that Plaintiff “was still unstable at times,” but fails  
3 to include Dr. Nand’s conclusion that despite these unstable times, he “is overall  
4 doing better,” “fully focused,” and “responding well to treatment” with “[g]ood  
5 coping skills.” Tr. 306-307. In August 2010, Plaintiff had “poor” concentration and  
6 low energy level, but during the same visit Dr. Nand noted appropriate behavior  
7 and direct eye contact, as well as good response to treatment and “good coping  
8 skills.” Tr. 303. In May 2011 and August 2011, Dr. Nand found poor concentration  
9 and labile mood during the mental status exam, and noted that he “continues to  
10 have problems in school.” Tr. 329, 333. However, Dr. Nand also consistently  
11 found that Plaintiff was fully focused, mood was with affect, he continued to  
12 improve, and had “good coping skills.” Tr. 328-329, 332-333.

13 After reviewing record, the court finds that while there is evidence in Dr.  
14 Nand’s treatment notes that could be interpreted more favorably to the Plaintiff,  
15 “where evidence is susceptible to more than one rational interpretation, it is the  
16 [Commissioner’s] conclusion that must be upheld.” *Burch v. Barnhart*, 400 F.3d  
17 676, 679 (9th Cir. 2005). Finally, as noted by psychological expert Dr. Moore,  
18 whose opinion was summarized in detail and given significant weight by the ALJ,  
19 Dr. Nand’s opinion is also “totally unsupported” by treatment notes indicating that  
20 no testing was done to substantiate the diagnoses of ADHD and bipolar disorder,

1 and providing no clear reason for why medications were prescribed for Plaintiff.<sup>1</sup>  
2 Tr. 24-25, 49-51. “[A]n ALJ need not accept a[] physician’s opinion that is  
3 conclusory and brief and unsupported by clinical findings.” *Tonapetyan v. Halter*,  
4 242 F.3d 1144, 1149 (9th Cir. 2001). For all of these reasons, the ALJ properly  
5 relied on medical expert testimony and substantial evidence to reject Dr. Nand’s  
6 opinion as unsupported by the treatment notes.

## 7 **2. Dr. Philip G. Barnard**

8 In April 2011 Dr. Barnard conducted a psychological consultative  
9 examination of Plaintiff. Tr. 324-327. Dr. Barnard noted that Plaintiff “seemed  
10 somewhat fidgety. He showed motor-restlessness. He yawned frequently. His

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11 <sup>1</sup> The Defendant cites testimony by Dr. Moore that it was “significant” that “there  
12 is not much observation of the young claimant himself, [rather] information is  
13 derived mostly from parental reports.” Tr. 24, 49-51. Thus, Defendant argues that  
14 the ALJ properly rejected Dr. Nand’s opinion because it was premised on  
15 Plaintiff’s mother’s subjective complaints, which were found not credible by the  
16 ALJ. ECF No. 17 at 9-10. However, the ALJ did not offer this reasoning in the  
17 decision, and the court “review[s] the ALJ’s decision based on the reasoning and  
18 factual findings offered by the ALJ – not post hoc rationalizations that attempt to  
19 intuit what the adjudicator may have been thinking.” *Bray v. Comm’r of Soc. Sec.*  
20 *Admin.*, 554 F.3d 1219, 1226 (9th Cir. 2009).

1 affect was rather flat to depressed.” Tr. 325. After conducting psychological tests,  
2 Dr. Barnard concluded that Plaintiff’s reasoning abilities on verbal tasks are in the  
3 “low-average range” and his nonverbal abilities are “significant[ly] higher and in  
4 the Average range.” Tr. 326. Dr. Barnard also noted that Plaintiff was in the fourth  
5 grade at the time of the examination, and on achievement tests he was reading at  
6 the fourth grade level, spelling at the fourth grade level, and had math skills at a  
7 third grade level. Tr. 326. Overall, Dr. Barnard concluded that Plaintiff “showed  
8 difficulty during the testing session in following tasks and staying focused.  
9 Diagnostically, [Plaintiff] demonstrates an [ADHD]/Combined Type .... He also  
10 exhibits a Bipolar Disorder, NOS.... The prognosis in this situation is guarded.”

11 Tr. 327. Plaintiff argues the ALJ improperly rejected Dr. Barnard’s opinion  
12 without providing adequate reasoning. ECF No. 14 at 13-16. The court disagrees.

13 The ALJ relied on Dr. Moore’s expert testimony that “she did not think  
14 there was much information available to Dr. Barnard, other than the mother’s  
15 statements, and further, she believed Dr. Barnard simply adopted the diagnoses of  
16 record based on the lack of testing to support the diagnoses reported.” Tr. 29. As  
17 noted above, “[t]he opinion of a nonexamining physician cannot *by itself* constitute  
18 substantial evidence that justifies the rejection of the opinion of either an  
19 examining or a treating physician.” *Lester*, 81 F.3d at 831 (emphasis added).

20 However, when the treating physician's opinion is contradicted by medical

1 evidence, the opinion may still be rejected if the ALJ provides specific and  
2 legitimate reasons supported by substantial evidence in the record. *See Andrews*,  
3 53 F.3d at 1041. As highlighted by Dr. Moore in her testimony, the ALJ found a  
4 lack of testing to support Dr. Barnard's diagnoses of ADHD and bipolar disorder.  
5 Tr. 29, 57-58, 62-63. "[A]n ALJ need not accept a[] physician's opinion that is  
6 conclusory and brief and unsupported by clinical findings." *Tonapetyan*, 242 F.3d  
7 at 1149. The court agrees with Plaintiff that, despite Dr. Moore's comments to the  
8 contrary, Dr. Barnard's report identifies a substantial amount of information he  
9 reviewed, including: teacher questionnaires and report forms, a psychoeducational  
10 assessment from 2009, and treatment notes. Tr. 324. Dr. Barnard also administered  
11 the Wechsler Intelligence Scale for Children – IV to Plaintiff, and the Vineland  
12 Adaptive Behavior Scales to Plaintiff's mother. Tr. 325-327. However, as noted  
13 by the ALJ, no behavioral difficulties were observed by Dr. Barnard upon  
14 examination, and "[t]esting indicated the claimant's intelligence was in the lower  
15 end of the average range, with commiserate word reading and spelling skills,  
16 although sentence comprehension and math were a grade level behind." Tr. 29,  
17 326-327. Thus, it was reasonable for the ALJ to find that Dr. Barnard's diagnoses  
18 of ADHD and bipolar disorder was unsupported by these relatively benign clinical  
19 findings.<sup>2</sup> *See Burch*, 400 F.3d at 679 ("where evidence is susceptible to more than

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20 <sup>2</sup> The ALJ also noted that "Dr. Barnard's comment that the claimant's overall

1 one rational interpretation, it is the [Commissioner's] conclusion that must be  
2 upheld.”).

3 Moreover, while not acknowledged in Plaintiff's briefing, the ALJ noted that  
4 Dr. Barnard performed testing but “did not comment upon any functional  
5 limitations, other than to note the claimant's mother's report of significant  
6 behavioral problems for several years.” Tr. 29. Rather, Dr. Barnard briefly noted  
7 that Plaintiff had some difficulties following tasks and staying focused; diagnosed  
8 Plaintiff with ADHD and bipolar disorder; and offered the vague conclusion that  
9 the “prognosis in this situation is guarded.” Tr. 327. It is well settled in the Ninth  
10 Circuit that the ALJ need not discuss all evidence presented, but must explain why  
11 significant probative evidence has been rejected. *Vincent v. Heckler*, 739 F.2d

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12 cognitive ability was ‘unable to be summarized because his nonverbal reasoning  
13 abilities were much better developed than his verbal reasoning skills’ is somewhat  
14 confusing.” Tr. 29. Plaintiff argues that “[t]he ALJ's own admitted confusion is not  
15 an adequate reason for rejecting [the] examining psychologist's opinions.” ECF  
16 No. 14 at 14. However, this admittedly vague commentary by the ALJ does not  
17 appear to be offered as a reason for rejecting Dr. Barnard's opinion, and therefore  
18 the court declines to analyze whether the ALJ erred in making this statement.  
19 Moreover, as discussed in this section, any error by the ALJ in making this  
20 statement would be harmless. *See Carmickle*, 533 F.3d at 1162.

1 1393, 1394-95 (9th Cir. 1984). Here, while the ALJ did consider his findings; Dr.  
2 Barnard's opinion is arguably not significant probative evidence because he did not  
3 identify any specific functional limitations applicable to the six domains. *See* ECF  
4 No. 17 at 11-12. Moreover, even if the ALJ erred in failing to assign weight to Dr.  
5 Barnard's opinion, any error is harmless because Dr. Barnard's opinion does not  
6 contain evidence of additional limitations beyond the ALJ's findings. *See*  
7 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (an  
8 error is harmless as long as there is substantial evidence supporting the ALJ's  
9 decision, and the error does not affect the ultimate nondisability determination).

### 10 **3. Grant Gilbert, Ph.D.**

11 In May 2011, DDS psychologist Dr. Gilbert completed a childhood  
12 disability evaluation as part of the disability determination explanation ("DDE") at  
13 the initial level of Plaintiff's SSI claim. Tr. 87-95. Dr. Gilbert found that Plaintiff  
14 had a marked limitation in the domain of attending and completing tasks. Tr. 91.  
15 Plaintiff briefly argues, without offering legal authority to support his contention,  
16 that the ALJ erred by failing to consider or reject Dr. Gilbert's "opinion." ECF No.  
17 14 at 16-17. The court disagrees. As noted above, an ALJ is not required to discuss  
18 every piece of evidence in the record. *See Howard ex rel. Wolff v. Barnhart*, 341  
19 F.3d 1006, 1012 (9th Cir. 2003). Instead, he or she is only required to explain why  
20 "significant probative evidence has been rejected." *Vincent*, 739 F.2d at 1394-95.



1 After reviewing the record as a whole, the court finds that Dr. Gilbert's evaluation  
2 at the initial level was not significant probative evidence. As an initial matter,  
3 social security regulations state that "[m]edical and psychological consultants in  
4 the State agencies are adjudicators at the initial and reconsideration determination  
5 levels.... As such, they do not express opinions; they make findings of fact that  
6 become part of the determination." SSR 96-5p, 1996 WL 374183 at \*6 (July 2,  
7 1996). Moreover, as noted by Defendant, Dr. Gilbert only identified "marked"  
8 limitations in one out of the six domains of functioning, and the ultimate finding at  
9 the initial level was that Plaintiff was "not disabled." ECF No. 17 at 12 (citing 91-  
10 95). A medically determinable impairment or combination of impairments  
11 functionally equals a listed impairment only if it resulted in "marked" limitations  
12 in two domains of functioning or an "extreme" limitation in one domain. 20 C.F.R.  
13 § 416.926a. Thus, even if the ALJ erred by not considering Dr. Gilbert's opinion  
14 that Plaintiff had marked limitations solely in domain of attending and completing  
15 tasks, any error is harmless because, based on the entire record, it would be  
16 inconsequential to the determination that Plaintiff is not disabled. ECF No. 17 at 12  
17 (citing *Molina*, 674 F.3d at 1115). For these reasons, the court finds the ALJ did  
18 not err by failing to consider Dr. Gilbert's "opinion" in the decision.

19 **B. Step Three**  
20

1 At step three of the sequential analysis, the ALJ must determine whether the  
2 impairment or combination of impairments meet, medically equal or functionally  
3 equal the severity of a set of criteria for an impairment in the Listings. 20 C.F.R. §  
4 416.924(d). As an initial matter, Plaintiff makes the cursory argument that the ALJ  
5 improperly determined that Plaintiff does not meet the Listings. ECF No. 14 at 17.  
6 However, this argument is based solely on the assumption that the ALJ improperly  
7 rejected Dr. Nand's opinion that Plaintiff met the Listings for ADHD and Mood  
8 Disorder. As discussed in detail above, the ALJ's reasons for rejecting Dr. Nand's  
9 opinion were legally sufficient and supported by substantial evidence. Thus, the  
10 ALJ did not err by finding that Plaintiff does not have an impairment or  
11 combination of impairments that meets or medically equals one of the Listings. Tr.  
12 26.

13 Where a child's impairment does not meet or equal one of the Listings, her  
14 impairments are evaluated under a functional equivalency standard. 20 C.F.R. §  
15 416.926a. To be functionally equivalent, an impairment must "result in 'marked'  
16 limitations in two domains of functioning or an 'extreme' limitation in one  
17 domain." § 416.926a(a). The domains of functioning are: (1) acquiring and using  
18 information; (2) attending and completing tasks; (3) interacting and relating to  
19 others; (4) moving about and manipulating objects; (5) caring for yourself; and (6)  
20 health and physical well-being. § 416.926a(b)(1). A limitation is marked where an

1 impairment “interferes seriously with your ability to independently initiate, sustain,  
2 or complete activities.” § 416.926a(e)(2)(i). Marked limitations are “‘more than  
3 moderate’ but ‘less than extreme.’” § 416.926a(e)(2)(i). A limitation is extreme  
4 where an impairment “interferes very seriously with your ability to independently  
5 initiate, sustain, or complete activities.” § 416.926a(e)(3)(i).

6 The ALJ is responsible for deciding functional equivalence after  
7 consideration of all evidence submitted. 20 C.F.R. § 416.926a(n). The regulations  
8 list the information and factors that will be considered in determining whether a  
9 child’s impairment functionally equals a listing. 20 C.F.R. §§ 416.926a, 416.924a,  
10 416.926a. In making this determination, the Commissioner considers test scores  
11 together with reports and observations of school personnel and others. §§  
12 416.924a, 416.926a(e)(4)(ii). The ALJ also considers what activities the child is, or  
13 is not, able to perform; how much extra help the child needs in doing these  
14 activities; how independent she is; how she functions in school; and the effects of  
15 treatment, if any. § 416.926a(b). In evaluating this type of information, the ALJ  
16 will consider how “appropriately, effectively, and independently” the child  
17 performs activities as compared to other children her age who do not have  
18 impairments. § 416.926a(b). This information comes from examining and non-  
19 examining medical sources as well as “other sources” such as parents, teachers,

1 case managers, therapists, and other non-medical sources who have regular contact  
2 with the child. *See* § 416.913(c)(3), d; Social Security Ruling (“SSR”) 98-1p, IV.B.

3 Plaintiff argues the ALJ erred by finding less than marked limitations in the  
4 domains of interacting and relating with others, and attending and completing  
5 tasks. ECF No. 14 at 18-25. The court will examine each domain in turn.

### 6 **1. Interacting and Relating with Others**

7 In the ‘interacting and relating with others’ domain, the ALJ considers how  
8 well the child initiates and sustains emotional connections with others, develops  
9 and uses the language of his community, cooperates with others, complies with  
10 rules, responds to criticism, and respects the possessions of others. 20 C.F.R. §  
11 416.926a(i). A typically functioning school-age child (age 6 to attainment age of  
12 12) is expected to: develop more lasting friendships with children his age; begin to  
13 understand working in groups to create projects and solve problems; increasing  
14 ability to understand other points of view; and talk well to people of all ages, share  
15 ideas, tell stories, and speak in a manner that both familiar and unfamiliar listeners  
16 readily understand. § 416.926a(i)(2)(iv).

17 The ALJ identified a less than marked limitation in Plaintiff’s ability to  
18 interact and relate with others. Tr. 33. Plaintiff argues that the ALJ erred by  
19 making “no findings specific to this domain,” choosing instead to improperly rely  
20 on Dr. Moore’s expert testimony. ECF No. 14 at 20. Defendant responds that the

1 ALJ's finding of less than marked limitations in this domain was supported by  
2 substantial evidence. ECF No. 17 at 15-17. The court agrees. As an initial matter,  
3 Plaintiff offers no case law to support his argument that the ALJ was required to  
4 specifically discuss every individual component of his evaluation of this domain.  
5 Further, Plaintiff supports his argument by citing a teacher questionnaire  
6 completed by Plaintiff's fourth grade teacher indicating that he had "an obvious  
7 problem" on a daily basis playing cooperatively with others, making and keeping  
8 friends, seeking attention appropriately, relating experiences and telling stories,  
9 and using adequate vocabulary. Tr. 248. This teacher additionally noted that  
10 Plaintiff's peers often complain that Plaintiff calls them names, and he has hit or  
11 kicked kids "maybe" four times that year. Tr. 248. Plaintiff also cites instances of  
12 discipline at school, over the course of almost two calendar years, that included  
13 punching, throwing a ball at another student, making inappropriate comments,  
14 being defiant, bullying, and using inappropriate language. Tr. 291. Finally,  
15 Plaintiff references his mother's testimony indicating behavioral problems outside  
16 of the school setting. ECF No. 14 at 22 (citing 72-80).

17 First, the court notes that the ALJ found Plaintiff's mother's testimony was  
18 not credible, and this finding was not challenged in Plaintiff's briefing. Tr. 27-28.  
19 Thus, Plaintiff's mother's testimony has limited relevance in determining whether  
20 substantial evidence supports the ALJ's finding in this domain. Second, the ALJ's

1 decision includes discussion all of the evidence cited in Plaintiff's briefing that  
2 might be considered more favorable to the Plaintiff, including the fourth grade  
3 teacher's evaluation and the disciplinary records over the course of three school  
4 years, and found they were "not supportive of ongoing, significant behavioral  
5 difficulties." Tr. 28, 33; *see Burch*, 400 F.3d at 679 ("where evidence is susceptible  
6 to more than one rational interpretation, it is the [Commissioner's] conclusion that  
7 must be upheld."). It is particularly notable that while Plaintiff's fourth grade  
8 teacher did assess "obvious" problems in this domain on a daily basis, the same  
9 teacher noted it was *not* necessary to implement behavior modifications. Tr. 248.

10 Finally, while not addressed by Plaintiff in his briefing, the ALJ relied on  
11 evidence in addition to Dr. Moore's testimony to support the finding of less than  
12 marked limitations in this domain. *See Andrews*, 53 F.3d at 1041 (testimony of a  
13 medical expert may serve as substantial evidence when supported by other  
14 evidence in the record). This evidence included (1) the results of  
15 psychoeducational assessment testing in 2011 finding that Plaintiff's behaviors fell  
16 within the normal range for his age and gender (Tr. 221); (2) the opinion of  
17 Plaintiff's fifth grade teacher who found "no problems observed in this domain"  
18 (Tr. 273); and (3) records from Plaintiff's treating and examining physicians that  
19 uniformly indicated no behavioral problems on exams (Tr. 33). For all of these  
20

1 reasons, substantial evidence supports the ALJ's finding of a less than marked  
2 limitation in the domain of interacting and relating with others.

## 3 **2. Attending and Completing Tasks**

4 In the 'attending and completing tasks' domain, the ALJ assesses how well  
5 the child can focus and maintain attention, and how well the child begins, carries  
6 through, and finishes activities. 20 C.F.R. § 416.926a(h). A typically functioning  
7 school-age child (age 6 to attainment age of 12) is expected to: focus attention in a  
8 variety of situations in order to follow directions, remember and organize school  
9 materials, and complete assignments; concentrate on details and not make careless  
10 mistakes in work; change activities or routines without distracting yourself or  
11 others and stay on task and in place when appropriate; sustain attention well  
12 enough to participate in a group sport, read by yourself, and complete family  
13 chores; and complete a transition task without extra accommodation. §  
14 416.926a(h)(2)(iv).

15 The ALJ found a less than marked limitation in the domain of attending and  
16 completing tasks. Tr. 31-32. Plaintiff generally assigns the same error in this  
17 domain that he did in the interacting and relating with others domain discussed  
18 above. Namely, Plaintiff contends that the ALJ erred by making "no specific  
19 findings relating to this domain," choosing instead to improperly rely on Dr.  
20 Moore's expert testimony. ECF No. 14 at 23-24. However, as above, the ALJ's

1 findings in this domain relied on evidence in addition to Dr. Moore's opinion that  
2 Plaintiff had less than marked limitations in the area of attending to and completing  
3 tasks. *See Andrews*, 53 F.3d at 1041. First, the ALJ cited psychoeducational  
4 assessment records that supported discontinuing IEP services and concluded that  
5 despite "some difficulty due to limited work effort, [Plaintiff's] behaviors now fall  
6 within the normal range for his age and gender." Tr. 221. Second, the ALJ  
7 referenced a questionnaire completed by Plaintiff's fifth grade teacher finding  
8 either "no problems" or "a slight problem" in the attending and completing tasks  
9 domain. Tr. 272. Finally, treatment notes from Dr. Nand, Plaintiff's treating  
10 provider, referenced variable concentration skills. Tr. 32. Plaintiff correctly notes  
11 that the ALJ also cites evidence that could be considered more favorable to  
12 Plaintiff's claims, including: Dr. Barnard's reports that Plaintiff showed difficulty  
13 during testing following tasks and staying focused (Tr. 325); and a teacher  
14 questionnaire completed by Plaintiff's fourth grade teacher indicating that he does  
15 not complete work independently and finishes early with no accuracy, but also  
16 noting that it was unclear if Plaintiff's issues were due to "capability or poor  
17 attitude." Tr. 247. However, where, as here, the evidence is susceptible to more  
18 than one rational interpretation, the ALJ's conclusion must be upheld. *See Burch*,  
19 400 F.3d at 679.



1 Plaintiff also argues that the ALJ failed to consider Dr. Gilbert's assessment  
2 that Plaintiff had a marked limitation in the domain of attending and completing  
3 tasks. ECF No. 14 at 24-25. However, as discussed above, the ALJ did not err in  
4 failing to discuss Dr. Gilbert's "opinion," and thus did not err in failing to include  
5 Dr. Gilbert's finding as part of the assessment of this domain. As a final matter, in  
6 order to be functionally equivalent, an impairment must "result in 'marked'  
7 limitations in *two* domains of functioning." § 416.926a(a)(emphasis added). Thus,  
8 even if the ALJ erred in failing to find a marked limitation in this domain, any  
9 error is harmless because the ALJ correctly found no limitations or less than  
10 marked limitations in the remaining five domains. *See Carmickle*, 533 F.3d at 1162  
11 (an error is harmless as long as there is substantial evidence supporting the ALJ's  
12 decision, and the error does not affect the ultimate nondisability determination).  
13 For the reasons discussed above, the ALJ's finding of less than marked limitation  
14 in the domain of attending and completing tasks was supported by substantial  
15 evidence.

## 16 CONCLUSION

17 After review the court finds the ALJ's decision is supported by substantial  
18 evidence and free of harmful legal error.

## 19 ACCORDINGLY, IT IS HEREBY ORDERED:

20 1. Plaintiff's Motion for Summary Judgment, ECF No. 14, is **DENIED**.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT ~ 25

2. Defendant's Motion for Summary Judgment, ECF No. 17, is

**GRANTED.**

The District Court Executive is hereby directed to enter this Order and provide copies to counsel, enter judgment in favor of the Defendant, and **CLOSE** the file.

**DATED** this 4<sup>th</sup> day of August, 2015.

*s/Fred Van Sickle*  


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 Fred Van Sickle  
 Senior United States District Judge